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No. 99-929

In The

Supreme Court of the United States

REBECCA MCDOWELL COOK,

Petitioner,

v.

DON GRALIKE,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF AMICUS CURIAE – PROFESSOR KRIS W. KOBACH – IN SUPPORT OF THE PETITIONER

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STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus curiae Kris W. Kobach is a law professor who specializes in constitutional law and American legal history at the University of Missouri – Kansas City – School of Law.[1] This brief focuses entirely on the Article V issue presented in this case. My participation as an amicus curiae does not stem from any organizational interest in upholding the amendments to Article VIII of the Missouri Constitution that were approved by Missouri voters on November 5, 1996 (hereinafter referred to as Article VIII). Rather, my participation is prompted by conclusions reached after four years of research on the use of constituent instructions in American history, and by seven years of research on the framing and meaning of Article V.

It is imperative that this Court be presented with a circumspect and accurate understanding of what the Framers intended when they drafted Article V and what their expectations were regarding the use of constituent instructions. It is with this concern in mind that I submit the following brief. The brief summarizes my historical research, presented in full in a recently-published law review article,[2] and explains how that research is relevant to the case before this Court. Because my particular expertise is limited to the Article V issue, and because it is only on this issue that I can provide this Court with information that it might not otherwise encounter, I limit my arguments accordingly.

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[1] The parties have consented to the filing of this brief. Counsel for a party did not author this brief in whole or in part. No person or entity, other than the Amicus Curiae or his employer (the University of Missouri), made a monetary contribution to the preparation and submission of this brief.

[2] Kris W. Kobach, *May "We the People" Speak?: The Forgotten Role of Constituent Instructions in Amending the Constitution*, 33 U.C. Davis L. Rev. 1 (1999).

ARGUMENT

I. ARTICLE V STIPULATES VOTING BODIES AND NUMERICAL HURDLES; IT DOES NOT PROVIDE A NORMATIVE DESCRIPTION OF APPROPRIATE DELIBERATIONS

The holding of the Eighth Circuit U.S. Court of Appeals that Missouri's Article VIII violates Article V of the U.S. Constitution assumed a rather decisive premise: that Article V does more than simply delineate the relevant voting bodies and the numerical hurdles that must be cleared for the adoption of a constitutional amendment. As the Eighth Circuit conceived it, Article V also stipulates *how* members of Congress and state legislatures must deliberate when considering an amendment. That is, it specifies the type of decision-making environment that must exist and the permissible pressures that may influence the votes of legislators. *See Gralike v. Cook*, 191 F.3d 911, 924-26 (8th Cir. 1999).

This is a rather remarkable assumption, given the succinct wording of Article V. The text of Article V tersely specifies the voting bodies and numerical hurdles involved in the proposal and ratification of an amendment to the U.S. Constitution. It does not describe any necessary deliberative conditions; nor does it prohibit any forbidden influences on representatives' voting. Nonetheless, the Eighth Circuit assumed that Article V contains an invisible subtext presenting a normative evaluation of appropriate constitutional deliberations.

This assumption is doubly remarkable in light of the fact that the records of the Framers' deliberations on Article V contain no hint whatsoever of this purported subtext. The records offer no suggestion that the Framers sought through Article V to define permissible decision-making environments for amending the Constitution. Rather, delegates to the Philadelphia Convention were almost entirely concerned with the questions of (1) whether any provision for amending the Constitution

was necessary, (2) whether Congress or proposing conventions should have the power to propose amendments, and (3) how large a majority should be required to propose and to ratify.[3] Thus, the initial weakness of the Eighth Circuit's holding lies in the fact that it rushes to insert into Article V an unstated requirement that deliberations be free of constraint when neither the text nor the records of the 1787 Convention offer any clear basis for doing so.

Article V is no more than a positivist rule of recognition for determining when an amendment of the Constitution has taken place. Provided that the ultimate decision to propose an amendment lies in the hands of Congress (or a proposing convention), the decision to ratify lies in the hands of the state legislatures (or ratifying conventions), and the requisite majorities are achieved, then the demands of Article V are satisfied. Nothing in the text proscribes citizens from attempting to influence what is ultimately attributed to "We the People." Nor has the Supreme Court added such a proscription in the past. The Court has merely confirmed that ratification must occur through a vote of the representative assemblies stipulated in Article V, and by those assemblies only. *Hawke v. Smith*, 253 U.S. 221 (1920). It is quite another matter, however, to divine that the "spirit" of Article V also bars the people of a state from pressing their representatives to favor a particular amendment. The Eighth Circuit effectively interpreted Article V so as to insert into the constitutional text the words "all deliberations on the proposal and ratification of amendments shall be free from significant popular pressure or constraint." In reaching this conclusion, the Eighth Circuit

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[3] *See generally* 1 *The Records of the Federal Convention of 1787* (Max Farrand ed., 1966) [hereinafter *Convention Records*], at 22, 121-22, 202-03, 231, 476; 2 *Convention Records*. at 87, 133, 136, 152, 159, 174, 188, 467-68, 557-61, 602, 629-31, 662; 3 *Convention Records*. at 120-21, 126, 357, 367, 400, 630; *Convention Records* Supp. at 191-92, 270.

crossed the line between interpreting Article V and embellishing upon it.

The Eighth Circuit imagined, without any citation to historical authority, that "Article V envisions legislatures acting as freely deliberative bodies in the amendment process and resists any attempt by the people of a state to restrict the legislatures' actions." *Gralike*, 191 F.3d at 924-25 (8th Cir. 1999). As this brief attempts to demonstrate, the Eighth Circuit's conception of Article V does not accurately reflect the intentions, experience, and expectations of the Framers.

II. THE USE OF CONSTITUENT INSTRUCTIONS BEFORE, DURING, AND AFTER THE FRAMING OF THE CONSTITUTION CLEARLY DEMONSTRATES THAT THE FRAMERS EXPECTED INSTRUCTIONS TO CONSTRAIN THE ARTICLE V AMENDMENT PROCESS

A. Constituent Instructions Were Common in America Prior to 1776

Instructions were a prominent feature of American colonial politics. They were used in virtually all of the colonies, although they were most prevalent in the colonies of New England.[4] Such instructions, consisting of "directions drawn up by a body of constituents to their particular representatives," ordered the representatives to take specified positions on issues of concern.[5] Depending on which representatives were being instructed, the instructions might come from voters assembled in town meetings, voters in county meetings, or state legislatures. In Massachusetts, the power of constituents to instruct

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[4] *See* Kobach, *May "We the People" Speak?*, 33 U.C. DAVIS L. REV. at 27-37.

[5] Gordon Wood, *The Creation of the American Republic, 1776-1787*, at 189 (1969).

their representatives was deemed a "sacred and unalienable" right under the common law.[6] At the First and Second Continental Congresses, virtually all of the delegates were bound by instructions from their respective states, in order, as the Virginia assembly put it, "[t]hat they may be better informed of our sentiments, touching the conduct we wish them to observe on this important occasion."[7]

By the 1760s, such instructions had become deeply entrenched in the political life of the colonies and carried de facto binding force. In most colonies no formal legal mechanism compelled the representative to obey his instructions. Nonetheless, as Daniel Dulany wrote, "their persuasive influence in most cases may be, for a representative who should act against the explicit recommendation of his constituents would most deservedly forfeit their regard and all pretension to their future confidence."[8] Such statements reflected the political scruples of the age; it was virtually unthinkable for a representative to disregard his constituent's instructions. The only tolerable choices were to obey one's instructions or to resign from office.

B. Constituent Instructions Propelled the Declaration of Independence

The seminal constitutional act of the American Republic – the Declaration of Independence – was the product of constituent instructions. Sentiment in favor of the break with Great Britain emanated upward from the local and colonial level, rather than downward from the

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[6] *See* Robert Luce, *Legislative Principles: The History and Theory of Lawmaking by Representative Government* (1930).

[7] Luce, *Legislative Principles* at 451.

[8] Daniel Dulany, *Considerations on the Propriety of Imposing Taxes in the British Colonies for the Purpose of Raising a Revenue, by Act of Parliament* (1765), *reprinted in* 1 *Pamphlets of the American Revolution, 1750-1776*, at 608 (Bernard Bailyn ed., 1965).

Continental Congress.[9] Nor was the cause of independence taken up eagerly or quickly. In April of 1776, a year after warfare had erupted at Lexington and Concord, independence was still widely perceived as an unsatisfactory alternative to reconciliation with the mother country.[10] Arguably, in such an environment, independence could not have been imposed from above by the Continental Congress; only instructions from below could confirm the shift in sentiment and the popular legitimacy of the cause.

North Carolina acted first. On April 12, 1776, the Provincial Congress of North Carolina, taking into account "the usurpations and violences attempted and committed by the King and Parliament of Britain against America,"[11] passed the following instruction:

> Resolved, That the Delegates for this Colony in the Continental Congress be empowered to concur with the Delegates of the other Colonies in declaring Independency, and forming foreign alliances, reserving to this Colony the sole and exclusive right of forming a Constitution and Laws for this Colony. . . . [12]

Although the resolve was worded permissively, with the colony's delegates "empowered" rather than affirmatively commanded to pursue independence, the extensive list of grievances preceding the instruction made clear the intent that the delegates were to vote for independence as soon as the concurrence of the other colonies could be

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[9] Charles A. Beard & Mary R. Beard, *A Basic History of the United States* 106 (1944).

[10] *See id.* at 104-106.

[11] Independence in North Carolina (April 12, 1776), *reprinted in* 5 *American Archives, Fourth Series* 859 (Peter Force ed., 1844).

[12] *Id.* at 860.

secured.[13] Delegates at the General Convention of Virginia acted next, on May 15, 1776. The convention voted unanimously to instruct its delegates in the Continental Congress "to propose to that respectable body to declare the United Colonies free and independent States; absolved from all allegiance to, or dependance [sic] upon, the Crown or Parliament of *Great Britain*. . . . "[14]

The New York Convention followed suit on May 15.[15] Meanwhile, town after town issued pro-independence instructions to representatives in the Massachusetts assembly during May and June of 1776.[16] Such instructions ultimately compelled the colonial assembly to favor independence and to instruct its delegates to the Continental Congress accordingly. By the end of June, 1776, delegates from at least nine colonies – Connecticut, Delaware, Massachusetts, Maryland, New Jersey, New York, North Carolina, Pennsylvania, and Virginia – had been instructed to vote for independence.[17] This series of events offers considerable support for the view that the founding generation regarded it as entirely appropriate for constituents to bind their representatives on constitutional matters. Indeed, not only did they deem it appropriate, they judged it vitally necessary. If they were going to set a legitimate constitutional course for the nation, the will of the people would have to fill the sails.

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[13] *See id.* at 859-860.

[14] Records of the Virginia Convention (May 15, 1776), *reprinted in* 6 *American Archives, Fourth Series* 1523, 1524 (Peter Force ed., 1846) [hereinafter 6 *American Archives*].

[15] Records of the New York Provincial Congress (May 15, 1776), *reprinted in* 6 *American Archives* at 1364.

[16] Kobach, *May "We the People" Speak?*, 33 U.C. Davis L. Rev. at 40-42.

[17] *See id.* at 38-47.

C. Constituent Instructions Guided Constitutional Deliberations in the American Confederation Prior to 1787

After independence, the frequent use of instructions in the conduct of public affairs continued, both at the state level and at the national level in the Continental Congress and the Congress of the Articles of Confederation. In the months immediately following the Declaration of Independence, the fledgling nation operated in a constitutional vacuum. This void had to be filled quickly and systematically. Not surprisingly, virtually all of the states used constituent instructions in fashioning their state constitutions.[18]

The Articles of Confederation took nearly five years to complete. The states utilized constituent instructions in shaping the Articles from the very start, even in calling for the Articles in the first place.[19] Although the Articles of Confederation contained no explicit provisions regarding the right to instruct delegates on either constitutional matters or routine statutory matters, the right was assumed by state legislatures. Such an assumption was natural, given the long history of constituent instructions in America and the fact that state legislators were themselves routinely instructed by their constituents. The instruction of representatives in the Confederation Congress was a common practice.[20] Indeed, two of the men who would later draft the *Federalist Papers* – John Jay and James Madison – were instructed on numerous occasions by the state of Virginia.[21] And such notable members of the founding generation as John Hancock, Samuel Adams, and Elbridge Gerry were regularly instructed by

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[18] *Id.* at 49.

[19] *Id.* at 51.

[20] *Id.* at 53-55.

[21] *See* Luce, *Legislative Principles* at 455-56.

the state of Massachusetts.[22] Madison plainly regarded constituent instructions as an intrinsic part of Congress's operations. This was evident in his arguments against a particular voting rule in April 1787, less than a month before the Constitutional Convention was to begin, when he warned that the rule in question could operate to defeat the carrying out of constituent instructions.[23]

D. Constituent Instructions Were Used During the Framing and Ratifying of the Constitution

In early 1787, constituent instructions again changed the course of American history. The members of Congress from New York had been instructed by their legislature to propose that Congress call a new constitutional convention subsequent to the Annapolis Convention of 1786 – one that would have the sanction of Congress.[24] On February 21, 1787, they carried out their instructions and moved that a new convention be called. After "some little discussion" and an initial vote against the motion, it passed.[25] In authorizing the convention by Resolution, Congress acknowledged the pivotal role that instructions had played in prompting congressional action: "[S]everal of the States, and particularly the State of New York, by express instructions to their Delegates in Congress, have suggested a Convention for the purposes expressed in the

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[22] *See, e.g.*, 16 *J. Cont. Cong.*, 1774-1789, at 276-77 (Worthington C. Ford et al., eds., 1904-37) (Mar. 22, 1780).

[23] 5 *Elliot's Debates* 104 (Jonathan Elliot 2d ed., 1888) (April 25, 1787). The rule against which Madison argued prohibited the raising of a question previously voted on, unless at least an equal number of states were present when the question was revived. *See id.* at 103-04.

[24] 5 *Ellict's Debates* 97 (Jonathan Elliot 2d ed., 1888) (Feb. 21, 1787).

[25] *Id.*

following Resolution. . . . "[26] With these words, the Confederation Congress documented the now all-but-forgotten fact that constituent instructions were directly responsible for the calling of the Philadelphia Convention.

Perhaps the most compelling evidence of the Framers' expectations regarding the role of constituent instruction in the process of constitutional amendment is the fact that some of the Framers were operating under instructions when they drafted Article V, itself. The delegates who came to Philadelphia from Delaware were acting under explicit instructions from their state legislature. In February 1787, the Delaware legislature commissioned George Read, Gunning Bedford, John Dickinson, Richard Bassett, and Jacob Broom to represent the state in Philadelphia. The same act also instructed the delegates. Their instructions forbade them from altering the Fifth Article of the Articles of Confederation, which provided that each state had a single, equal vote in Congress.[27]

It is difficult to overstate the importance of the Delaware instructions. The convention records taken by James Madison and Robert Yates both make special note of the Delaware instructions, which were read to the assembled convention, along with the credentials of all of the delegates on the first day of business.[28] This early positioning had a marked impact on the final shape of the Constitution that emerged. The Delaware delegates' entrenchment on the view that all states, large or small, should have an equal vote in Congress fueled the smaller states' resistance to proportional representation and was thus critical to the emergence of the compromise providing for equal representation in the Senate.

Instructions not only constrained several of the Framers of the Constitution in Philadelphia, they also

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[26] 3 *Convention Records* 13-14.

[27] 3 *Convention Records* 574-75.

[28] 1 *Convention Records* 4, 6.

constrained the ratifiers in the state conventions. Many delegates to the state ratifying conventions were bound by strict instructions from their constituents. This was perhaps most evident at the Maryland ratifying convention. When one of the delegates who opposed the Constitution attempted to propose several amendments to it, he was interrupted by thirteen delegates who declared:

> that they were elected and instructed by the people they represent, to ratify the proposed constitution, and that as speedily as possible, and to do no other act; that after the ratification their power ceased, and they did not consider themselves as authorized by their constituents to consider any ammendments [sic.][29]

This body of pro-Constitution delegates adhered rigidly to their instructions, and in the face of arguments against the Constitution "remained inflexibly silent."[30] The relevance of such instructions to the present case is considerable. The argument that the Framers and ratifiers of the Constitution intended there to be no constraining of constitutional deliberation via constituent instructions rings rather hollow in light of the fact that many Framers and ratifiers were themselves so constrained.

E. Numerous Framers and Ratifiers Recorded their Expectation that Future Constitutional Deliberations Would be Constrained by Instructions

Undertaking the constitutional deliberations of 1787 with some delegates under charge of instruction was not

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[29] Records of the Maryland Ratifying Convention, *reprinted in* Documents from the Continental Congress and Constitutional Convention (Library of Congress collection), at http://lcweb2.loc.gov/cgi-bin (April 21-26, 1788).

[30] *Id.*

regarded as problematic or improper by the Framers.[31] Indeed, numerous post-convention writings by various Framers addressed the issue of constituent instructions directly, confirming that they would, and should, happen routinely in the future. Most of these statements occurred during the ratification debates that followed the convention. Perhaps the most illustrative explanation of the role that instructions would play in the amendment process under the new Constitution came from John Dickinson of Delaware. After summarizing the hurdles set up by Article V, he wrote the following description:

> Thus, by a gradual progress, we may from time to time *introduce every improvement in our constitution*, that shall be suitable to our situation. For this purpose, it may perhaps be advisable, for every state, as it sees occasion, to form with the utmost deliberation, drafts of alterations respectively required by them, and *to enjoin their representatives, to employ every proper method to obtain a ratification*.[32]

A state would "enjoin" its representatives via instructions. This term, which was used interchangeably with "instruct," reflected just how powerful the binding force of constituent instructions could be at the time of the framing.

Rufus King, who had been a Massachusetts delegate to the Philadelphia Convention, emphasized this fact in order to assuage the fears of wavering delegates at the Massachusetts ratifying convention. He insisted that

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[31] For a description of an oblique reference to instructions during the Convention by James Wilson and James Madison, *see* Kobach, *May "We the People" Speak?*, 33 U.C. DAVIS L. REV. at 59.

[32] John Dickinson, *The Letters of Fabius*, No. VII (1788), *reprinted in Friends of the Constitution: Writings of the "Other Federalists"* 1787-1788 (Colleen A. Sheehan and Gary L. McDowell, eds.) 496 (1998) (emphasis in last sentence added).

members of the new Congress would not be able to disregard their constituents' instructions:

> The State Legislatures, if they find their delegates erring, can and will instruct them. Will not this be a check? When they hear the voice of the people solemnly dictating to them their duty, they will be bold men indeed to act contrary to it. These will not be instructions sent them in a private letter, which can be put in their pockets; they will be public instructions, which all the country will see; and they will be hardy men indeed to violate them.[33]

King's statement is particularly relevant to the present case. He stressed that the *public* nature of the instructions, combined with the disrepute into which any disobedient representative would fall, gave the instructions their binding force. And he spoke approvingly of the public shame that would attach to any errant representative. Disobedience of such instructions was not only dishonorable, it was political suicide. Thus, it is unlikely that King, Dickinson, or their contemporaries would have objected to the use of ballot notations to inform voters whether or not their representatives had heeded their instructions.

Among the other Framers who assured skeptics of the Constitution that the people and the states could use instructions to press for amendments was Alexander Hamilton, who faced a New York Convention that was leaning against ratification.[34] Hamilton was attempting to assuage New York ratifiers who felt that the size of the Congress was too small. He made clear his expectation that, when such amendments were needed, instructions

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[33] Kobach, *May "We the People" Speak?*, 33 U.C. DAVIS L. REV. at 60.

[34] *See* Charles A. Beard & Mary R. Beard, *A Basic History of the United States* 136 (1944).

would be given and Members of Congress would be bound to follow them: "If the general voice of the people be for an increase [in the number of Members of Congress], it undoubtedly must take place. They have it in their power to instruct their representatives; and the State Legislatures, which appoint the Senators, may enjoin it also upon them."[35]

Other Federalist defenders of the proposed Constitution insisted that certain specific reforms desired by opponents of the Constitution could eventually be secured via the use of instructions. For example, Trench Coxe used this argument when he published essays in defense of the Constitution during the Pennsylvania ratification debates. In answering critics who charged that the right to trial by jury would not be secure under the Constitution, Coxe insisted that congressional regulation of the new federal courts would be shaped by "[t]he known principles of justice, the attachment to trial by jury whenever it can be used, the instructions of the state legislatures, the instructions of the people at large. . . ."[36] Coxe's prediction was accurate: instructions were indeed used subsequently to shore up the jury right via the Sixth and Seventh Amendments, as described below. In this way, numerous defenders of the Constitution promised wavering ratifiers that constituent instructions would continue to shape the process of constitutional amendment under Article V.

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[35] Alexander Hamilton's statement before the New York ratifying convention (June 21, 1788), *reprinted in* 2 *Elliot's Debates* 252 (2d ed., 1888)

[36] Trench Coxe, *An American Citizen: An Examination of the Constitution of the United States*, No. IV (1788), *reprinted in Friends of the Constitution: Writings of the "Other Federalists"* 1787-1788 (Colleen A. Sheehan and Gary L. McDowell, eds.) 472 (1998).

F. Constituent Instructions Constrained Deliberations on the Earliest Constitutional Amendments, Particularly the Bill of Rights.

Perhaps the most convincing evidence that the Framers did not regard constituent instructions as impermissible under Article V is the fact that instructions constrained the proposal of the Bill of Rights – the first occasion on which Article V was employed. After ratification of the Constitution, many of the Framers were subsequently elected to serve in the new Congress and were bound by instructions to seek the proposal of the Bill of Rights. This was part of an explicit quid pro quo, whereby the conventions of reluctant states would agree to ratify the new Constitution in exchange for congressional proposal of a Bill of Rights and other amendments. The deal, which first took shape at the Massachusetts ratifying convention, was secured by instructions that constrained numerous Members of the First Congress.

The ratifying conventions of four states – Massachusetts, South Carolina, New York, and Rhode Island – inserted such instructions prominently in their ratification messages to Congress. Other states, such as New Hampshire, instructed their Members of Congress in subsequent acts. Consider the instructions issued by the South Carolina convention. After listing the state's desired alterations to the Constitution, the ratification message stated the following: "*Resolved*, That it be a standing instruction to all such delegates as may hereafter be elected to represent this state in the general government, to exert their utmost abilities and influence to effect an alteration of the Constitution, conformably to the aforegoing resolutions."[37]

As under the Articles of Confederation, there was no mistaking the de facto binding power of such instructions. They exerted a powerful coercive effect upon members of the First Congress. As Massachusetts Representative

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[37] Ratification Message of S.C. (May 23, 1788) (emphasis in original), *in* 1 *Elliot's Debates* 325 (2d ed. 1888).

Elbridge Gerry, who had been a delegate at the 1787 Convention, stated before Congress on July 21, 1789:

> The members from Massachusetts were particularly instructed to press the amendments recommended by the convention of that State at all times, until they had been maturely considered by Congress; the same duties were made incumbent on the members from some other States; consequently, any attempt to smother the business, or prevent a full investigation, must be nugatory. . . . [38]

Plainly, such instructions played a critical role in pressing Congress to propose the Bill of Rights. If any episode demonstrates most clearly how the Framers envisioned that Article V would work, then this is it. This amendment process occurred immediately after the adoption of the Constitution; and most of the Framers took part in it, either as members of Congress or as members of their state ratifying conventions.

In all, the ratifying conventions of seven states – Massachusetts, South Carolina, New York, Rhode Island, New Hampshire, Virginia, and North Carolina – conditioned their ratification of the U.S. Constitution on the proposal of particular amendments.[39] The first five in this list explicitly instructed their members of Congress to press for the desired amendments. The two others, Virginia and North Carolina, issued general statements from their ratifying conventions that called for amendments but did not explicitly instruct their congressional delegations.[40]

Constituent instructions continued to constrain the constitutional amendment process after the adoption of

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[38] Elbridge Gerry (July 21, 1789), *in* 1 *Annals of Congress* 688 (Joseph Gales ed., 1834).

[39] Statement of Senator Van Buren (1826), *in* 4 *Elliot's Debates* 489 (2d ed. 1888).

[40] *See* Kobach, *May "We the People" Speak?*, 33 U.C. DAVIS L. REV. at 63-66.

the first ten amendments. Less than a month after the 1793 decision of the Supreme Court in *Chisolm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), the legislatures of Massachusetts and Virginia instructed their Senators to seek a constitutional amendment denying federal courts jurisdiction over suits by citizens against states. Connecticut and North Carolina followed soon thereafter, and in January 1794, the resolution that would become the Eleventh Amendment in 1798 was introduced on the Senate floor.[41] Constituent instructions also drove the proposal of the Twelfth Amendment. In the wake of the Jefferson – Burr contest for the Presidency in 1800-01, the legislature of New York instructed its Senators to press for a revised system of electing Presidents. New Hampshire, Vermont, and Massachusetts joined New York and instructed their Senators to favor the electoral system reforms that would become the Twelfth Amendment, proposed by Congress in December 1803.[42]

G. Constituent Instructions Played an Important Role in the Adoption of the Twenty-First Amendment

Although the use of constituent instructions waned in the late nineteenth century, in 1928 and 1933, citizens reasserted their power to compel their representatives in Congress to set Article V into motion. Referendum voters in several states pressed Congress to repeal the prohibition amendment. This pressure occurred via instructions, petitions, and requests.[43] Massachusetts voters instructed their State Representatives and Senators, who in turn requested the President and Congress to amend the U.S. Constitution. In the November 1928 election, voters in thirty-six of the state's forty senatorial districts were presented with

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[41] Clyde E. Jacobs, *The Eleventh Amendment and Sovereign Immunity* 65 (1972).

[42] *See* Kobach, *May "We the People" Speak?*, 33 U.C. DAVIS L. REV. at 71.

[43] *See id.* at 82-85.

the following ballot question: "Shall the senator from this district be instructed to vote for a resolution requesting Congress to take action for the repeal of the Eighteenth Amendment to the Constitution of the United States, known as the prohibition amendment?"[44] A majority of voters approved the proposition in all but two of the senate districts.[45]

In addition to partly driving the proposal of the Twenty-first Amendment by Congress, constituent instructions played an important role in shaping the second stage of the Article V process – ratification. The Twenty-first Amendment is the only constitutional amendment that Congress has ever sent to state conventions for ratification, rather than to the state legislatures. Importantly, constituent instructions were used once again to constrain the voting of delegates. In the state of Oregon, voters took the opportunity to instruct their convention delegates how to vote. On July 21, 1933, a special referendum was held to decide the following ballot issue:

> AN AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA – Purpose: To instruct the delegates to the constitutional convention as to whether the electors of the respective counties of the state of Oregon desire the amendment of the constitution of the United States by the adoption of the proposed article of amendment:
>
> [text of proposed Twenty-first Amendment.]
>
> Vote YES or NO
>
> Yes. I vote for the proposed amendment.
>
> No. I vote against the proposed amendment.[46]

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[44] 1929 Mass. Acts 544-52 (1929). Voters were presented with a similar ballot issue regarding the instruction of their Representatives in the Massachusetts House. *See id.* at 552.

[45] *Id.* at 544-52. Luce, *Legislative Principles*, at 476-77.

[46] 1933 Oregon Laws, 2nd Special Sess. 10 (1933).

The overwhelming majority of voters voted yes, in favor of ratification.[47] Seventeen days later, on August 7, 1933, the convention ratified the Twenty-first Amendment.[48]

III. THE FACT THAT THE FIRST CONGRESS CONSIDERED INSERTING A RIGHT-TO-INSTRUCT PROVISION INTO THE BILL OF RIGHTS, BUT DECLINED TO DO SO, IN NO WAY IMPLIES THAT THE FRAMERS REJECTED THE USE OF CONSTITUENT INSTRUCTIONS IN THE ARTICLE V AMENDMENT PROCESS

When considering the package of amendments that was to become the Bill of Rights, the First Congress considered inserting an instructions provision into what would become the First Amendment and decided against doing so. The Respondents in this case have noted that fact and have drawn the rather superficial and illogical conclusion that if an instructions provision wasn't included, instructing must be constitutionally prohibited. Br. of Resp. in Opp. to Writ of Cert., 13-14. In fact, the congressional rejection of an express "right to instruct" provision was largely an acknowledgement of the fact that such a clause would be unnecessary. Instructions were already occurring without any constitutional invitation.

The suggestion of including a right-to-instruct provision in the Bill of Rights was a response to fears expressed at the time of ratification that the new and more powerful Congress might abandon the prevailing political norm of obedience to instructions and start exercising its augmented powers without regard to the wishes of the people.[49] Proposed by Representative Thomas Tucker of South Carolina on August 15, 1789, the instructions provision

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[47] *Id.* The statewide totals were 136,713 in favor of the amendment and 72,854 against, or 65 percent in favor. *Id.*

[48] *Id.*

[49] *See* Kobach, *May "We the People" Speak?*, 33 U.C. DAVIS L. REV. at 66.

would have been inserted into the text of what eventually became the First Amendment. The proposed language declared the right of the people "to instruct their representatives."[50] There was considerable confusion in the ensuing debate about what effect this amendment would have. Instructions had long been prominent on the American political landscape, and many Members of the First Congress were already operating under charge of instruction. Thus it was unclear what the amendment was intended to accomplish.

Most Congressmen apparently believed that Tucker's amendment would have the effect of making instructions formally binding, such that a Member's refusal to vote in accordance with his instructions would either invalidate his vote or invalidate the entire law being voted upon. James Jackson of Georgia reasoned that, under the proposed amendment, any member of Congress who votes against his instructions "commits a breach of the constitution."[51] The precise consequences of such a breach were unclear, but Jackson did not want to travel down the path: "In short, it will give rise to such a variety of absurdities and inconsistencies, as no prudent Legislature would wish to involve themselves in."[52] Thomas Stone of Maryland attempted to explore and define those absurdities: "I venture to assert, without diffidence, that any law passed by the Legislature would be of no force, if a majority of the members of this House were instructed to the contrary, provided the amendment became part of the constitution."[53]

Most Members of Congress preferred to stick with the status quo, under which instructions were satisfactorily enforced by informal norms. As Jackson put it, "Let the

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[50] 1 *Annals of Cong.* 761 (Joseph Gales ed., 1834).

[51] *Id.*

[52] *Id.*

[53] *Id.* at 767.

people consult and give their opinions; let the representative judge of it; and if it is just, let him govern himself by it as a good member ought to do; but if it is otherwise, let him have it in his power to reject their advice."[54] The argument that it was unnecessary to make instructions constitutionally binding, and that doing so would be problematic in practice, gained momentum as the debate proceeded.[55]

James Madison opposed the amendment. If, as most of his colleagues believed, the amendment would make instructions formally and legally binding, then what would happen to a Congressman who disregarded his instructions? "Suppose he refuses, will his vote be the less valid, or the community be disengaged from that obedience which is due to the laws of the Union?"[56] On the other hand, Madison argued, if the proposed amendment merely stated the right of constituents to instruct their representatives, who were free to disregard such instructions at their peril, then it was unnecessary to insert the proposed text into the Constitution. The right to instruct was already provided for under the freedom of speech.[57]

In Madison's view, this ambiguity of meaning offered another strong reason to oppose Tucker's instruction provision. Such uncertain language would jeopardize the ratification of the entire amendment package. He pointed to

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[54] *Id.* at 764.

[55] At the outset of the debate, two Members remarked in general terms about the desirability or undesirability of constituent instructions in a democracy. However, this more general line of discourse was not the focal point of debate, and it was not taken up in any significant way by others in the chamber. See the remarks of Representative Thomas Hartley of Pennsylvania in opposition to the use of instructions, *id.* at 761-62, and the remarks of John Page of Virginia in favor of the use of instructions, *id.* at 762-63.

[56] *Id.* at 766-67.

[57] *Id.*

"the difficulties arising from discussing and proposing abstract propositions, of which judgment may not be convinced."[58] He favored keeping the list of amendments straightforward and easily understandable: "I venture to say, that if we confine ourselves to an enumeration of simple, acknowledged principles, the ratification will meet with but little difficulty."[59] Madison repeated this argument once again at the end of the floor debate, just before the question was called.[60] When the vote finally came, the proposed amendment language was defeated, with 10 in favor and 41 opposed.[61]

Although a solid majority in the House of Representatives voted against inserting the proposed right-to-instruct language into what would become the First Amendment, this vote was plainly not a rejection of the practice of constituent instructions. Madison's argument regarding the constitutional uncertainty that would attach to laws passed in disobedience to instructions evidently persuaded his House colleagues, as did the argument that such a clause was unnecessary. The tradition of constituent instructions was well established in the fledgling republic, and indeed many Members of the First Congress were already operating under charge of instruction when considering the proposal of the Bill of Rights. The political scruples of the era were more than sufficient to enforce constituent instructions without venturing into the constitutional thicket of making disobedience a violation of the Constitution.

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[58] *Id.* at 766.

[59] *Id.*

[60] *See id.* at 775.

[61] *Id.* at 776.

IV. THE POLITICAL CULTURE OF THE EARLY AMERICAN REPUBLIC GAVE CONSTITUENT INSTRUCTIONS DE FACTO BINDING POWER, MAKING THEM CONSIDERABLY MORE COERCIVE THAN MISSOURI'S ARTICLE VIII.

Given the dominant role played by constituent instructions in our nation's constitutional history and in the Framers' vision of how Article V would operate, Respondents cannot reasonably claim that the Framers deemed instructions impermissible under Article V. However, one might argue that the addition of ballot notations in Missouri's Article VIII makes the modern instructions so much more coercive than the instructions of the eighteenth century that they are impermissible under Article V.

This argument is untenable, however, in light of the overwhelming coercive effect that eighteenth-century instructions possessed. As noted in the preceding section, the political culture of the period demanded resignation as the price of disobedience. The coercive effect of constituent instructions in such an environment certainly equaled or exceeded the coercive effect of the modern instructions combined with ballot notations. The political scruples of the framing era made it all but impossible for representatives to disobey their instructions. As the *Continental Journal* of Boston put it in 1778, "no member will venture to counteract the declared sentiments of his constituents; as, besides its being a breach of trust, it would infallibly ruin his interest among them."[62] If a representative disagreed so strongly with his instructions that he could not bring himself to follow them, the political mores of the period demanded resignation before disobedience. This was demonstrated vividly during the framing of the Maryland constitution in 1776, when the delegates Carroll, Chase, and Worthington found their constituents' instructions to

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[62] *Continental Journal*, Oct. 15, 1778, *quoted in* Wood, *Creation of the American Republic, 1776-1787*, at 192 (1969).

be "extremely against their inclinations."[63] All three felt compelled to resign rather than disregard their instructions.[64]

The binding power of constituent instructions remained substantial through the first half of the nineteenth century. Two future Presidents – John Quincy Adams of Massachusetts (in 1807) and John Tyler of Virginia (in 1836) – resigned from the Senate when their instructions from their state legislature conflicted with their strongly-held personal views.[65] In resigning his seat Tyler wrote, "I now reaffirm the opinion at all times heretofore expressed by me, that instructions are mandatory, provided they do not require a violation of the Constitution or the commission of an act of moral turpitude."[66] Tyler was not alone; six other Senators declined to follow their states' instructions on the same issue and resigned.[67] Similar commentary on the binding nature of instructions may be found scattered throughout the political writings of the early Republic.[68]

The historical record described above establishes that eighteenth- and early-nineteenth-century instructions had

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[63] Kobach, *May "We the People" Speak?*, 33 U.C. DAVIS L. REV. at 49.

[64] *Id.*

[65] Richard B. Bernstein & Jerome Agel, *Amending America: If We Love the Constitution So Much, Why Do We Keep Trying To Change It?*, at 123.

[66] Niles' Register, 50, *cited in* Luce, *Legislative Principles*, at 469.

[67] The issue was a Senate resolution expunging the vote of censure against President Jackson from the Senate record. Tyler opposed the resolution. 2 George H. Haynes, *The Senate of the United States* 1025-31 (1938); Luce, *Legislative Principles*, at 468-70.

[68] *See* Kobach, *May "We the People" Speak?*, 33 U.C. DAVIS L. REV. at 57-58, 60-61, 76-77.

a coercive effect on the voting and behavior of representatives. An instruction issued in such a political culture could not be ignored. The representative regarded himself as duty-bound to follow his instructions. Today, such political scruples have all but evaporated. Although the citizens of Missouri could not re-create the political mores of the past, they could at least give themselves notification when politicians evaded their instructions. Their lack of trust was vindicated in February 1997, when Representatives obscured their opposition to congressional term limits by voting on several variations of the amendment, allowing them to vote in favor of at least one, secure in the knowledge that none would pass.[69] Instructions paired with ballot notations make such misrepresentation difficult to pull off.

Ultimately, the argument that ballot labels make the instructions too coercive is specious for three reasons. First, the text of Article V does not invite judicial scrutiny of the myriad external sources of coercion that may affect voting in Congress or the Missouri legislature.[70] Second, the Framers and ratifiers were plainly willing to tolerate instructions in a political culture that gave them significant coercive effect. Third, Missouri's Article VIII, when it was presumed to be in effect, empirically did not succeed in compelling Missouri's Representatives in Congress to follow their instructions. For example, Representative Jo Ann Emerson of Missouri declared on the Floor of the House

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[69] "Everybody in the U.S. House got a chance to vote 'yes' on term limits Wednesday, while comfortably aware that the measure wouldn't pass." *Having It Both Ways*, DES MOINES REGISTER, Feb. 15, 1997, at A8. Members were offered eleven variations of term limit amendments to vote on, giving them the opportunity to tell their constituents that they voted for term limits, though they knew that no one proposal would receive a two-thirds majority. *Id.*

[70] Such external pressure may come from voters, lobbyists, financial contributors, the executive branch, the news media, and other sources.

that she intended to depart from her constituents' instructions.[71]

V. THE PRECEDENTS OF *HAWKE V. SMITH* AND *LESER V. GARNETT* DO NOT SUPPORT THE HOLDING OF THE EIGHTH CIRCUIT.

Unable to marshal any historical support for its insertion of an unconstrained-deliberation requirement into Article V, the Eighth Circuit sought justification in the Supreme Court precedents of *Hawke v. Smith*, 253 U.S. 221 (1920), and *Leser v. Garnett*, 258 U.S. 130, 137 (1922). In *Hawke*, the Court considered whether Article V permitted the state of Ohio to make the ratification of proposed amendments to the U.S. Constitution subject to voter approval in a statewide referendum. *Id.* at 225. The Ohio constitution had transferred to the citizens final, direct authority to ratify constitutional amendments. The Court's decision turned on the question of what the Framers of Article V meant in requiring ratification by "legislatures." Concluding that the Constitution refers to action by the representative bodies of the several states in those provisions where it calls for action by state legislatures, the Court reasoned Ohio could not constitutionally substitute a binding popular vote on ratification for ratification by the state's legislature. *Id.* at 227-28.

Plainly, the *Hawke* decision is not dispositive on the question of the constitutionality of Article VIII. Where the Ohio procedure attempted to fully transfer the ratification power to the people through a direct popular vote on the amendment, Article VIII leaves the final ratification decision in the hands of the legislators. Moreover, the Court in *Hawke* never implied that an instructed legislature would not constitute a "Legislature" within the meaning of Article V. The same may be said of the Court's holding in *Leser*

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[71] 43 Cong. Rec. E277-02, *E277 (1997) (statement of Rep. Emerson), *cited in* Kobach, *May "We the People" Speak?*, 33 U.C. DAVIS L. REV. at 23-24.

v. Garnett, 258 U.S. 130, 137 (1922), in which the Court reiterated its view that the ratification power is not subject to alteration by the people of a state. In that case, the Court rejected the claim that a state legislature lacked the power to ratify the Nineteenth Amendment if the amendment would be invalid under the state's constitution. *Id.*

The Eighth Circuit relied on *Hawke* and *Leser* to reach its constricted view of Article V in spite of the fact that in *Kimble v. Swackhamer*, 439 U.S. 1385 (1978), Justice Rehnquist, acting as Circuit Justice, had revisited the holding in *Hawke* and *Leser* and reached the conclusion that Article V did not bar the people from guiding the amendment process. The question in *Kimble* was whether the citizens of Nevada could hold an "advisory" referendum on the Equal Rights Amendment to guide their state legislators in deciding whether to ratify the Amendment. *Id.* Justice Rehnquist explicitly rejected any reading of *Hawke* and *Leser* that required the insulation of ratifying legislatures from the popular expression of opinion on such issues:

> [A]pplicants' reliance upon this Court's decisions in *Leser v. Garnett* and *Hawke v. Smith* is obviously misplaced. Both seem to me to stand for the proposition that the two methods for state ratification of proposed constitutional amendments set forth in Art. V of the United States Constitution are exclusive. . . .
>
> Under the Nevada statute in question, ratification will still depend on the vote of the Nevada Legislature. . . . I would be most disinclined to read either *Hawke*, *supra*, or *Leser*, *supra*, or Art. V as ruling out communication between the members of the legislature and their constituents. *Id.* at 1387-88 (citations omitted).

As Justice Rehnquist concluded, provided that the ultimate decision to ratify lies in the hands of state representatives, Article V in no way prohibits popular attempts to guide legislators in their decision making. The massive pressure on Nevada legislators to obey the will of the people generated by the referendum did not violate Article

V because "ratification [would] still depend on the vote of the Nevada legislature." *Id.* at 1387. Similarly, as long as the ultimate decision to vote for or against the proposal of a term limits amendment lies in the hands of Missouri's Members of Congress, Article V in no way prohibits the people of Missouri from encouraging them to do so.

The Eighth Circuit attempted to distinguish *Kimble* by stressing the non-binding nature of the Nevada referendum. Members of the Nevada legislature were "free to disregard" the popular verdict delivered by the referendum. *Gralike,* 191 F.3d at 925. This characterization is, of course, misleading. Although Nevada's referendum on ratifying the Equal Rights Amendment was merely advisory de jure, it was binding de facto. The popular verdict had a pronounced effect on the Nevada legislature, making it politically impossible for most legislators to vote in favor of ratification. Nevada voters handed the Equal Rights Amendment a staggering defeat in the referendum, with 67 percent opposed. Consequently, Nevada legislators were decidedly unwilling to support it in the face of this popular verdict: both the Senate and the Assembly declined to even bring the Amendment to a floor vote.[72]

The likely persuasive effect of Article VIII on representatives would be no greater than that of Nevada's referendum. In the wake of Nevada's unequivocal popular verdict on the ERA, it was difficult for state representatives to ignore the vox populi. Article VIII utilizes direct democracy in the same way to present legislators with clear instructions regarding the term limits issue. The coerciveness of any referendum, be it advisory, an instruction, or otherwise, depends on a variety of factors.[73] Thus, the

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[72] Nev. Bill Hist., 60th Sess. (1979).

[73] For example, a landslide result expresses the will of the voters more convincingly than does a 51 percent majority. Thus, it is not unreasonable to suppose that a legislator in a state that approved an instruct-and-inform law by a slim majority would be more willing to disregard the will of the electorate than a

mere characterization of a referendum as "advisory" does not necessarily make it easy for legislators to ignore.

At their core, the instruct-and-inform laws embody communication between constituents and representatives – communication designed to express the preferences of the former and influence the voting of the latter. Similar communication was at issue in *Kimble*. As Justice Rehnquist concluded, "I would be most disinclined to read either *Hawke*, . . . or *Leser*, . . . or Article V as ruling out communication between the members of the legislatures and their constituents." 439 U.S. at 1387-88. Justice Rehnquist declined to construe these precedents as a blanket rejection of "citizen participation in the amendatory process." *Id.* at 1387. Plainly, the Eighth Circuit was overreaching when it used the *Hawke* and *Leser* precedents to reach the conclusion that Article V "resists any attempt by the people to restrict the legislatures' actions." 191 F.3d at 925.

CONCLUSION

In summary, the holding of the Eighth Circuit is based on a deeply flawed and ahistorical understanding of what the Framers of Article V actually contemplated. It is no exaggeration to state that the U.S. Constitution is largely the product of constituent instructions. Instructions thoroughly permeated the constitutional deliberations of the Framers' era. As James Madison envisioned, the "public voice pronounced by the representatives of the people" would govern the new republic.[74]

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legislator faced with a 70 percent majority in a so-called advisory referendum.

[74] *Id.* at 47. Under the Madisonian vision, elected representatives would refine and relay the preferences of their constituents, not be insulated from such preferences. As Madison wrote, such representatives would "refine and enlarge the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best determine the

The Eighth Circuit's assertion that Article V prohibits constituents from constraining "freely deliberative [legislative] bodies," 191 F.3d 924, is simply incredible, given the staggering weight of the historical evidence indicating that the Framers and ratifiers intended the Article V process to be constrained by constituent instructions. The Constitution is ostensibly a set of rules that "We the People" adopted over the course of more than 210 years, implicitly accept today, and may amend tomorrow. But now we have been told that Article V permits no popular direction of the amendment process. For the Eighth Circuit to make this claim is somewhat remarkable; for it to do so without historical support is deeply irresponsible. What is at stake is not merely one small provision of the Constitution, but the premise of the entire Constitution – the premise that the people may have some say in what it contains. Unfortunately, if the decision of the Eighth Circuit is allowed to stand, our Constitution will be one from which "We the People" have been politely dismissed.

Respectfully Submitted,

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true interests of their country, and whose patriotism and love of justice, will be least likely to sacrifice it to temporary or partial consideration." *The Federalist No. 10*, at 46-47 (James Madison) (Garry Wills ed., 1982).